

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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Heather L. Wallen,

Petitioner,

v.

William Reubart, *et al.*,

Respondents.

Case No. 2:24-cv-00717-MMD-DJA

ORDER

Heather L. Wallen has submitted a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and has now paid the filing fee. (ECF Nos. 1-1, 4.) The Clerk of Court will be ordered to docket the petition. Having screened the petition under Rule 4 of the Rules Governing Habeas Corpus Cases Under Section 2254, the Court concludes that the petition contains factual allegations that demonstrate the possibility of constitutional error and, therefore, will direct the Clerk to serve it on Respondents. For reasons discussed below, however, Respondents will not be required to respond to the petition pending a determination of whether Wallen can show cause as to why the petition should not be dismissed as unexhausted or why this action should be stayed.

Wallen challenges a judgment of conviction entered in the Fifth Judicial District Court of and for Nye County, Nevada, finding her guilty, pursuant to a guilty plea, of conspiracy to commit burglary and battery causing substantial harm. (ECF No. 1-1 at 1.) She was adjudicated a habitual criminal. The Nevada Court of Appeals entered its order affirming the judgment on May 11, 2023.¹ It appears from Wallen's federal petition that she did not file a state petition for postconviction relief.

¹The Court takes judicial notice of the order entered by the Nevada Court of Appeals affirming Wallen's judgment of conviction on direct appeal. *See Wallen v. State*, No. 84826-COA (Nev. Ct. App. May 11, 2023).

1 A federal court will not grant a state prisoner's petition for habeas relief until the
2 prisoner has exhausted her available state remedies for all claims raised. See *Rose v.*
3 *Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state courts
4 a fair opportunity to act on each of her claims before she presents those claims in a federal
5 habeas petition. See *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *Duncan v. Henry*,
6 513 U.S. 364, 365 (1995). A claim remains unexhausted until the petitioner has given the
7 highest available state court the opportunity to consider the claim through direct appeal
8 or state collateral review proceedings. See *Casey v. Moore*, 386 F.3d 896, 916 (9th Cir.
9 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9th Cir. 1981).

10 On direct appeal, Wallen raised a single claim: that the district court erred by failing
11 to continue *sua sponte* the sentencing hearing after it did not grant her counsel's oral
12 request at sentencing to withdraw from the case. See *Wallen*, No. 84826-COA. She now
13 presents three claims in her federal petition: (1) the state appellate court denied her the
14 right to a fair and impartial review; (2) the appellate court abdicated its responsibility
15 knowing the district judge entrapped petitioner and failed to abide by court rules; and (3)
16 the appellate court denied her the right to a fair review because the district court amended
17 a ten-year-old conviction and separated it into five prior convictions. None of these three
18 claims has been presented to the state appellate courts; therefore, the petition is wholly
19 unexhausted.

20 Wallen may have filed her federal petition out of concern about the time limitation
21 imposed by 28 U.S.C. § 2244(d)(1)(A). Under that provision, a state prisoner must file a
22 federal habeas petition within one year of "the date on which the judgment became final
23 by the conclusion of direct review or the expiration of the time for seeking such review."
24 28 U.S.C. § 2244(d)(1)(A). If Wallen intends to ask this Court to stay this petition while
25 she attempts to exhaust the claims in state court, she must file a motion for stay and
26 abeyance. In *Rhines v. Weber*, the Supreme Court placed limitations upon the discretion
27 of the court to facilitate habeas petitioners' return to state court to exhaust claims. See
28 544 U.S. 269 (2005). First, "stay and abeyance should be available only in limited

1 circumstances.” *Id.* at 277. And the relief “is only appropriate when the district court
 2 determines there was good cause for the petitioner’s failure to exhaust [her] claims first
 3 in state court.” *Id.* Moreover, “it likely would be an abuse of discretion for a district court
 4 to deny a stay and to dismiss a mixed petition if the petitioner had good cause for [her]
 5 failure to exhaust, [her] unexhausted claims are potentially meritorious, and there is no
 6 indication that the petitioner engaged in intentionally dilatory litigation tactics.” *Id.* at 278.
 7 The Ninth Circuit has held that the application of an ‘extraordinary circumstances’
 8 standard does not comport with the ‘good cause’ standard prescribed by *Rhines*. See
 9 *Jackson v. Roe*, 425 F.3d 654, 661-62 (9th Cir. 2005). A petitioner’s reasonable confusion
 10 about whether a state filing would be timely will ordinarily constitute ‘good cause’ for her
 11 to file in federal court and ask for a stay under *Rhines*.² This Court may stay a partially or
 12 wholly unexhausted petition if: (1) the habeas petitioner has good cause; (2) the
 13 unexhausted claims are potentially meritorious; and (3) petitioner has not engaged in
 14 dilatory litigation tactics. See *Rhines*, 544 U.S. at 278; see also *Mena v. Long*, 813 F.3d
 15 907 (9th Cir. 2016); *Wooten v. Kirkland*, 540 F.3d 1019, 1023-24 (9th Cir. 2008). The
 16 Court will give Wallen an opportunity to show cause as to why this case should not be
 17 dismissed as unexhausted or to move for a stay.

18 It is therefore ordered that the Clerk of Court is directed to file and electronically
 19 serve the petition (ECF No. 1-1) on Respondents and add Aaron D. Ford, Nevada
 20 Attorney General, as counsel for Respondents.

21 It is further ordered that the Clerk provide Respondents with an electronic copy of
 22 all items previously filed in this case by regenerating the Notice of Electronic Filing to the
 23 Office of the Attorney General only.

24 It is further ordered that Petitioner has 30 days from the date that this order is
 25 entered to show cause as to why her Petition should not be dismissed without prejudice
 26 as unexhausted or to file a motion for stay and abeyance. Failure to respond within the


27 ²It appears that, if Wallen pursues a state postconviction petition, it may be
 28 procedurally barred as untimely and an abuse of the writ under state law absent a showing
 of good cause and actual prejudice to overcome the default. See NRS §§ 34.726, 34.810.

1 time allowed or show good cause for an extension will result in dismissal without prejudice
2 and without further notice.

3 It is further ordered that all assertions of fact made by Petitioner in response to this
4 order to show cause must be detailed, specific as to time and place, and supported by
5 competent evidence. Petitioner should attach copies of all materials upon which she
6 bases her argument that her petition should not be dismissed as unexhausted or that a
7 stay is warranted.

8 It is further ordered that, if Petitioner files a motion for stay and abeyance,
9 Respondents may oppose, and petitioner may reply as provided for in Local Rule 7-2.

10 DATED THIS 13th day of June 2024.

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MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE
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